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No. 94-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

L. DEWAYNE NEELY and
GLENDA CAROL CHADWICK, Individually and as
Administrators of the ESTATE OF
GREGORY DEWAYNE NEELY,

Plaintiffs/Petitioners

v.

DADE COUNTY, GEORGIA, a Political Subdivision
of the State of Georgia, and its
BOARD OF COMMISSIONERS in their
Official Capacity,

Defendants/Respondents

On Petition For A Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a County has a duty under the Due Process Clause of the Federal Constitution' Fourteenth Amendment to provide non-employee rescue workers with certain minimal levels of safety and security during rescue missions conducted by the County.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unpublished. *See Neely v. Dade County, Georgia*, No. 93-9439 (11th Cir. Mar. 14, 1995) (per curiam). The decision of the district court also is unpublished. *See Neely v. Dade County, Georgia*, No. 4:92-cv-248-HLM (N.D. Ga. Oct. 29, 1993).

JURISDICTION

The date of the entry of the judgment of the Court of Appeals was March 14, 1995. The Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 are the applicable provisions involved in this case. These provisions are quoted in full in the Appendix.

STATEMENT OF THE CASE

On September 29, 1992, petitioners, the sole surviving heirs of Gregory Dewayne Neely, brought a civil rights suit against respondents Dade County, Georgia and the County's Board of Commissioners in their official capacities. In their complaint filed with the United States District Court for the Northern District of Georgia, petitioners alleged, among other things, that respondents unconstitutionally deprived Neely of his life. As a result, the petitioners sought damages pursuant to 42 U.S.C. § 1983. The district court had jurisdiction of the case pursuant to 28 U.S.C. § 1331.

The district court granted summary judgment in favor of respondents, holding that respondents did not have a constitutional duty to protect Neely. *Neely v. Dade County, Georgia*, No. 4:92-cv-248-HLM (N.D. Ga. Oct. 29, 1993) (Murphy, J.). The Court of Appeals affirmed without opinion, *Neely v. Dade County, Georgia*, No. 93-9439 (11th Cir. Mar. 14, 1995) (per curiam) (Dubina, J., Roney & Eschbach, S.J.) and then denied petitioners' suggestion of rehearing en banc filed pursuant to Eleventh Circuit Rule 35-3, *Neely v. Dade County, Georgia*, No. 93-9439 (11th Cir. May 30, 1995).

The facts at issue are as follows. On October 2, 1990, a person fell from a mountain cliff in Dade County, Georgia. When Dade County ("the County") officials were notified, they requested assistance from the air ambulance unit (rescue helicopter) operated by the Erlanger Medical Center in Chattanooga, Tennessee. The request was made by the dispatcher of the Dade County Sheriff ("the Sheriff"). The air unit is called "LifeForce". Among the responding LifeForce crew members was a paramedic, Gregory Dewayne Neely, the decedent.

Upon landing at the mountaintop rescue scene, Neely promptly made himself available to officials of County agencies responsible for the rescue operation. Neely was assisted by County rescue workers in putting on rapelling equipment, and he went down the mountain connected to County ropes for the descent. He successfully rapelled the cliff and immediately rendered medical aid to the patient. Neely then cooperated with other rescue workers to prepare the patient for extrication in a "Stokes basket" which was to be raised from the clifftop.

During his ascent, Neely was forced to rest on a safe ledge, 12 feet beneath the rock ledge, where the county rescue workers were assembled. He was then thrown a white rope by County personnel, which he wrapped about his waist. The rope was virtually identical in size, weave and appearance as an authorized life-safety rope. Several members of the Dade County Rescue Unit then grabbed the rope and hoisted Mr. Neely to the very crest of the outcrop.

The edge of the outcrop was uncovered and unpadded, thus exposing Neely's lifeline to the bare rock. As Neely neared the top, the rope snapped and he fell down the 150 foot cliff, landing amongst rocks below. Neely survived the fall, but had suffered massive injuries. He died the next day.

The rope used by Neely was later tested and found to be an unauthorized rescue rope, with a breaking strength of only 400 pounds rather than the minimum 9,000 pounds-strength required by Georgia standards set forth in the Georgia Emergency Management Agency Rescue Specialist Manual (the "Rescue Manual"). Dade County rescue workers brought this rope to the scene on the County Quick Response Vehicle (the "QRV"), owned by Dade County and maintained at the Dade County Emergency Service building for the purposes of rescue and victim extrication. The Georgia Emergency Management Agency (hereinafter referred to as "GEMA") training manual instructs rescue workers that rescue vehicles are to be equipped with ropes made of nylon or polyester, with a breaking strength of at least 9,000 pounds.

In support of their response to the motion for summary judgment filed by respondents, petitioners supplied the affidavit of Mr. Bruce Smith, an expert in

rescue and rope rapelling. Mr. Smith reviewed depositions of the parties, sworn statements of 24 persons present at the scene, the actual rope that broke, and the Resolution of Dade County dealing with emergency management services. He then expertly opined that the rope, which was made from asbestos, was "inherently dangerous" and "deceptively similar" to a genuine life support rope such that it was indistinguishable from a standard life-support rope in night use.

Mr. Smith further opined that the failure to train personnel to recognize and distinguish life support rope, to maintain it on the QRV, and the failure to adopt an incident command system, was gross negligence in terms of standard rescue operations, and that these failures proximately resulted in Neely's fall and death. Petitioners' rescue expert also opined that this rope did not possess the abrasive-resistant and tensile strength of universally accepted standard life support material.

Several present and former members of the Dade County rescue squad affirmed that there was no incident command system in place or followed at the time of this incident, that no person was in overall charge of the incident scene, and that Dade County did not provide or pay for rescue training according to the GEMA rescue training manual, nor provide any other training in rescue.

Rescue operations in Dade County had been assigned by it's then-sole Commissioner, Larry Moore, to the County's emergency management agency director ("the director"). The position of the director was created by Resolution of the Commissioner in 1982 (the "Resolution"), pursuant to the Georgia Emergency Management Act of 1981. Under Georgia law, the director was charged with direct responsibility for the

local operation for emergency management, including rescue functions. See O.C.G.A. §§ 38-3-27(a) and 38-3-3(1). The purpose of the GEMA law is, among other things, to protect the public safety and to preserve lives. See O.C.G.A. § 38-3-2(a)(4). The director had additional specific responsibilities under the Dade County Emergency Operations Plan (hereinafter referred to as the "Plan"), which was adopted pursuant to the Resolution.

Twenty months prior to the incident involving Neely, the director resigned, citing that Dade County "seems to hold its own" without an emergency management department. Dade County's governing authority (the sole Commissioner) failed to appoint a new director for the *20 months* that preceded and included the date of this incident.

REASON FOR GRANTING THE WRIT

This case provides the Court with an opportunity to answer a question left open in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). In that case, the Court held that a government entity does not have a duty under the Due Process Clause of the Fourteenth Amendment to provide *employees* with certain minimal levels of safety and security in the workplace. *See id.* at 126. The Court did not consider, however, whether a government entity has a duty under the Due Process Clause of the Fourteenth Amendment to provide *non-employees* with certain minimal levels of safety and security during government operations. This is an important question of federal law that should be settled by the Court.

ARGUMENT

A governmental agency has a duty under the due process clause of the Federal Constitution's Fourteenth Amendment to provide minimum levels of safety to non-employees who undertake rescue operations conducted by the governmental agency when the non-employee has been involuntarily placed in danger.

This Court has repeatedly stated that the Due Process Clause of the Fourteenth Amendment, as well as of the Fifth Amendment, does not as a general rule confer upon individuals an "affirmative right to governmental aid." *DeShaney v. Winnebago Soc. Servs.*, 489 U.S. 189, 196 (1989). Accordingly, the Due Process Clause does not confer upon a governmental agency the obligation to provide medical treatment. *Maher v. Roe*, 432 U.S. 464, 469 (1977). Nor does it confer upon a governmental agency the obligation to provide certain essentials which are necessary to secure the preservation of life, such as adequate housing. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). As the Court has stated: "Although the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference . . . , it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." *Harris v. McRae*, 448 U.S. 297, 317-18 (1980).

Nonetheless, despite its unwillingness to impose constitutional obligations upon government agencies, *see Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985), the Court has not, and indeed cannot, adopt a principle which holds governmental agencies immune from liability in all circumstances. The Due Process Clause of the Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or

property, without due process of law." Thus by its plain terms the amendment "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law.'" *DeShaney*, 489 U.S. at 195. Accordingly, the Court has conceded that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198.

Four cases from this Court illustrate the circumstances where a government agency has an affirmative obligation to provide certain levels of safety and security: *Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Bell v. Wolfish*, 441 U.S. 520 (1979); and *Estelle v. Gamble*, 429 U.S. 97 (1976). In *Revere*, the Court considered among other things whether the Due Process Clause requires a governmental agency to provide medical care to persons who have been injured while being apprehended by police. In that case, members of the Revere, Massachusetts, police force responded to a report of a breaking and entering. Upon arrival at the scene, they attempted to detain an individual named Patrick Kivlin, who attempted to escape. After repeated warnings to halt were not obeyed, one of the police officers fired at Kivlin, wounding him. Kivlin was later taken to Massachusetts General Hospital.

The Court left no doubt that the government agency had a constitutional obligation under the Due Process Clause to provide medical care to Kivlin. In fact, the Court noted, "the due process rights of a person in Kivlin's situation are at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.* at 244. The Court concluded that the governmental agency fulfilled its constitutional obligation by "seeing that Kivlin was taken promptly to a hospital

that provided the treatment necessary for his injury." *Id.* at 245. Accordingly, the Court determined that where a governmental agency places an individual in danger, that governmental agency has a constitutional obligation to provide aid to the injured person.

In *Youngberg*, the Court again concluded that in the circumstances involved the governmental agency had a constitutional obligation to provide safety and security. In that case, Nicholas Romeo, a profoundly retarded individual, suffered severe injuries while residing at a State institution. In her claim under 42 U.S.C. § 1983, Romeo's mother alleged that officials at the institution knew or should have known that Romeo was suffering injuries and that the officials failed to institute procedures to prevent such injuries from occurring.

Before the Court, the State conceded that Romeo had a right to adequate food, shelter, clothing, and medical care. *Youngberg*, 457 U.S. at 315. Apparently accepting those concessions, the Court continued and concluded that Romeo also had a constitutional right to reside in a safe environment, *id.*, that Romeo had a constitutional right to freedom from bodily restraint, *id.* at 316, and that Romeo had a constitutional right to minimally adequate training, *id.* at 322. As a consequence, because of the existence of these rights, the State was constitutionally obligated to provide affirmative aid.

Similarly, in *Bell*, the Court again determined that in certain circumstances a governmental agency must provide minimum levels of security and safety. In that case, inmates of a federally-operated short-term custodial facility designed primarily to accommodate pretrial detainees, sought a writ of habeas corpus to challenge certain conditions of confinement. In particular, the

inmates alleged, among other things, that the practice of double-bunking was unconstitutional.

Although the Court rejected the notion that the Due Process Clause contains a "'one man, one cell' principle," *Bell*, 441 U.S. at 542, the Court acknowledged that a pretrial detainee may not be subject to punishment: "Under such circumstances [where individuals are held prior to trial], the Government concededly may detain [an individual] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." *Id.* at 536-37. As a result, the Court implied that the government must provide certain minimal levels of habitability so as not to subject the detainees to punishment.

Likewise in *Estelle*, the Court recognized that a State must provide adequate medical care to incarcerated prisoners. *Estelle*, 429 U.S. 103-04. In reaching this conclusion, the Court reasoned that because the prisoner is unable to care for himself due to his incarceration, then it is only "just" that the State care for him. *Id.* at 104. Accordingly, here again the Court has acknowledged that in certain limited circumstances the Constitution imposes upon governmental agencies an affirmative obligation to provide care and safety.

The Court has recently remarked that *Estelle*, *Youngberg*, *Revere*, and implicitly *Bell*, taken together stand

> for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes a corresponding duty to assume

> some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney, 489 U.S. at 199-200 (citations omitted).

If the Court means what it said in *DeShaney*, then, contrary to the decision of the district court and court of appeals, petitioners should succeed in holding respondents liable in this case. Respondent Dade County conducted a rescue operation to save the life of

a person who fell off a mountain. Neely, who was not a Dade County official, acted at the behest of the county officials conducting the rescue operation. During the operation, Neely was given a rescue rope and was hoisted up the mountain top. Tragically, the rescue rope, which was the property of the county, was not of sufficient strength to withstand the weight of Neely. Nor were precautions taken to ensure that the rope was protected from rubbing against sharp rock. Given the situation the county placed Neely in, it is without question that the county "affirmative[ly] . . . restrain[ed] the individual's [Neely's] freedom to act on his own behalf." *Deshaney*, 489 U.S. at 200. Accordingly, because Neely was deprived of his liberty by reason of affirmative acts by the county, Neely was entitled to protections under the Due Process Clause. By failing to provide the proper strength rope and by failing to have trained personnel conduct the hoisting of Neely up the mountain top, the county acted with "deliberate indifference" to the rights of Neely and thus should be held liable under 42 U.S.C. § 1983. *See City of Canton v. Harris*, 489 U.S. 378, 389, 392 (1989); *see also Daniels v. Williams*, 474 U.S. 327, 330 (1986).

Petitioners acknowledge that in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), the Court rejected a somewhat similar argument. In that case, an employee of a municipal sanitation department died of asphyxia after entering a manhole to unstop a sewer line. The employee's wife subsequently brought an action under 42 U.S.C. § 1983, alleging, among other things, that her husband had a due process right to work in a safe and secure working environment and that the municipality breached that right by failing to provide certain minimal levels of safety and security for its employees.

The Court rejected the widow's argument. It concluded that "[n]either the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *Collins*, 503 U.S. at 126. Although acknowledging that it has imposed a duty on governmental entities "to take care of those who have already been deprived of their liberty," *id.* at 127, the Court concluded that in this case the municipality had not deprived the deceased employee of his liberty at the time of the death.

Contrary to the facts in *Collins*, however, in this case Neely was not an employee of the governmental agency. This determination was explicitly made by the district court. See Appendix at A-14 n.1. This fact is crucial to distinguishing *Collins* because central to the Court's conclusion in *Collins* was the fact that the decedent had voluntarily accepted employment with the municipality and thus could not assert that the municipality deprived him of his liberty. *Id.* at 128. In this case, however, it cannot be said that Neely voluntarily accepted the offer of employment by the County. Rather, Neely had entrusted his personal liberty to county officials once he was being hoisted up the mountaintop with the reasonable expectation that the rescue operation would be conducted adequately and without "deliberate indifference" to his life. *See Canton*, 489 U.S. at 389. Consequently, this case is more analogous to the *Revere*, *Youngberg*, *Bell*, and *Estelle* line of cases which impose constitutional obligations upon the governmental agency to provide certain levels of safety and security.

CONCLUSION

For the reasons stated above, petitioner asks that the Court grant the petition.

Respectfully submitted,

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APPENDIX I. ELEVENTH CIRCUIT OPINION

Neely v. Dade County Georgia
No. 93-9439

Appeal from the United States District Court
for the Northern District of Georgia

Before DUBINA, Circuit Judge, RONEY and
ESCHBACH*, Senior Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1[1]

"Costs taxed against plaintiffs-appellants."

Judgment Entered: March 14, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNall
Deputy Clerk

ISSUED AS MANDATE: 5/30/95

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

[1]11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX II. DISTRICT COURT OPINION

Neely v. Dade County
No. 4:92-cv-248-HLM

[Filed: October 29, 1993]

ORDER

This case is before the Court on Defendants' Motion for Summary Judgment. For the reasons stated below the Court grants the motion.

I. Background

Greg Neely worked for the Erlanger Medical Center in Chattanooga, Tennessee as a member of the Life Force helicopter ambulance unit. In the later afternoon of October 2, 1990, the dispatcher in the Dade County Sheriff's Office requested the help of Life Force in the rescue of a person who fell off a cliff in Dade County. Life Force responded to the call. When Life Force arrived, the Trenton Fire Department rescue unit of Dade County was already at the scene attempting to rescue the fallen person. The situation was chaotic and it is unclear if anyone was fully in charge of the rescue effort.

Once at the scene, Greg Neely was asked to rappel off the cliff to held administer medical treatment to the fallen person. Greg Neely did so. After helping administer medical care and remove the person from the scene, he began to climb back up to the top. He stopped approximately twelve feet from the top of the cliff at a ledge and removed his rappeling gear. Delbert Wallin, a member of the Trenton rescue unit, was on the ledge assisting in the rescue. He told Greg Neely that he could walk up a trail to the top. Greg Neely did not do

so. Instead, he grabbed a white rope hanging from the top of the cliff and tied it around him. He then began to climb up to the top. Members of the Trenton rescue unit also helped pull him up to the top. Unfortunately, as Greg Neely was about to crest the top of the cliff, the rope broke, and he fell to his death.

The rescue unit from the Trenton Fire Department arrived at the scene in a Quick Response Vehicle owned by Dade County. The rope which broke came from this vehicle.

Plaintiffs contend that Larry Moore, the sole Commissioner of Dade County at the time of the accident, is responsible for the accident. Plaintiffs state that as the Commissioner, he was responsible for assigning responsibility for rescue operations to the Emergency Management Director, in accordance with the Georgia Emergency Management Act of 1981 ("GEMA"). This Act required each county to create a local organization for emergency management, the position of emergency management director, and an emergency operations plan. Twenty months prior to the accident, however, the Emergency Management Director resigned, and Commissioner Moore failed to appoint a replacement.

Plaintiffs contend that Defendants failure to appoint an Emergency Management Director for the twenty months prior to the accident caused Greg Neely's death. Plaintiffs complaint states two counts: (1) a claim for gross negligence under state law; and (2) a section 1983 claim under federal law. Defendants have now moved for summary judgment. They contend that they are immune from any state law claim and that Plaintiffs have failed to state a claim under section 1983.

II. Standard of Review

Federal Rule of Civil Procedure 56(c) authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exits. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The moving party's burden is discharged merely by "'showing'--that is, pointing out to the District Court--that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In assessing whether the movant has met this burden, the District Court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *See Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983). Once the moving party has adequately supported its motion, the nonmovant then has the burden to show that summary judgment is improper, coming forward with specific facts showing a genuine dispute. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In deciding a motion for summary judgment, it is not part of the Court's function to decide issues of genuine material fact but solely to determine whether there is such an issue to be tried. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). It is the applicable substantive law which will identify those facts that are material. *Anderson*, 477 U.S. at 248. Facts which in good faith are disputed, but which do not resolve or affect the outcome of the suit will not properly preclude

the entry of summary judgment. *Id.* In short, such facts are not material. The materiality of a fact rests solely on the governing substantive law. A District Court "can only grant summary judgement 'if *everything* in the record . . . demonstrates that no genuine issue of material fact exists.'" *Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986), *quoting Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1908) (emphasis in original).

Genuine disputes are those by which the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson*, 477 U.S. at 248. Moreover, for factual issues to be "genuine" they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . .. Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* at 586 (citations omitted.) "[T]his standard mirrors the standard for a directed verdict . . . . [T]he inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

III. Discussion

A. Gross Negligence Claim

Plaintiffs contend that County Commissioner Larry Moore's failure to appoint an Emergency Management Director pursuant to the Georgia Emergency Management Act of 1981 caused Dade County to be grossly negligent in: (1) supplying unsafe rope in the rescue; (2) failing to inspect the rope; (3) failing to properly train its employees in the use of ropes in rescue; and (4) failing to properly supervise the rescue incident. More specifically, Plaintiffs allege that

Dade County's rescue unit's use of a non-life support rope, and failure to institute an incident command system at the rescue site was grossly negligent.

Defendants claim they are immune from liability under section 38-3-35(b) of the Georgia Code. Defendants assert that the section provides immunity to emergency management workers under GEMA.

The Court finds that Defendants are immune under section 38-3-35(b) of the Georgia Code. That section provides in relevant part:

> Neither the state nor any political subdivision of the state
>
> nor, except in the cases of willful misconduct, gross negligence, or bad faith, the employees, agents, or representatives of the state or any political subdivision thereof, . . .
>
> complying with or reasonably attempting to comply with Articles 1 and 3 of this chapter; or any order, rule, or regulation promulgated pursuant to Articles 1 through 3 of this chapter, . . . or pursuant to any ordinance relating to precautionary measures enacted by any political subdivision of the state
>
> shall be liable for the death of or the injury to person or for damage to property as a result of any such activity.

O.C.G.A. §38-3-35(b).

First, the Court finds that Defendants reasonably attempted to comply with the provisions of GEMA.

Pursuant to sections 38-3-27 and 28 of GEMA, Dade County created a local organization for emergency management, the position of emergency management director, and an emergency operations plan, prior to Greg Neely's accident. *See* Larry Moore Aff. pp. 9-14; Trenton dade County Emergency Operations Plan (the "Dade County Plan") (attached to Plaintiffs' Response to Defendants' Motion for Summary Judgment).

The Dade County Plan identifies various hazards and assigns responsibility to organizations in the County for those hazards. The Dade County Plan assigns the Emergency Management Director primary responsibility for coordination of search, rescue, and recovery. *See* The Dade County Plan, Annex 3. In the event the Emergency Management Director is unavailable, the County Sheriff has responsibility for coordinating search, rescue and recovery. See The Dade County Plan, Attachment F.

Here, it is undisputed that the original Emergency Management Director resigned on February 7, 1989, and that Dade County was without an Emergency Management Director for the 20 months prior to Greg Neely's fall. Pursuant to the Dade County Plan, however, the County Sheriff was his emergency interim successor during that time. This procedure was in compliance with the requirements under GEMA. *See* O.C.G.A. §38-3-50 (provides that emergency interim successor exercises the duty of the appointed officer until successor is appointed). Furthermore, it is unrebutted that during the time there was no Emergency Management Director all rescue training and procedures continued unchanged. *See* Larry Moore Dep. pp. 12-13, 50.

Second, the Court finds Larry Moore, the only employee or representative named in the complaint, was not guilty of willful misconduct, gross negligence, or bad

faith in failing to appoint an Emergency Management Director for the 20 months prior to Greg Neely's fall. The least demanding standard of those listed is gross negligence. *See Reliance Ins. Co. v. Walker County*, 208 Ga. App. 729, 732 (1993) (stating that gross negligence is a lesser standard of care than willful misconduct or bad faith). Gross negligence constitutes "the want of slight care and diligence [or] . . . carelessness manifestly materially greater than want of common prudence" as applied to particular facts and circumstances. *Rider v. Taylor*, 166 Ga. App. 474 (1983).

As discussed, the Dade County Plan provided that the Sheriff was the success in charge of rescue. Thus, there was an official in charge of rescue. Moreover, Plaintiffs have not rebutted Larry Moore's testimony that the training and procedures for rescue continued unchanged during the time there was not an Emergency Management Director. Therefore, the Court concludes that under these facts and circumstances Larry Moore's failure to appoint an Emergency Management Director for the 20 months prior to Greg Neely's fall did not constitute gross negligence causing Greg Neely's death.

B. Section 1983 Claim

Plaintiffs contend that Defendants failure to appoint an Emergency Management Director constituted deliberate indifference to the safety of Greg Neely in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs recognize that generally a government does not owe a duty to its citizens to make them safe. However, Plaintiffs contend that if there is a special relationship or special danger present, then the government does owe a duty to make a particular citizen safe. Defendants argue that there is no special relationship or special danger present.

To prevail in this civil rights action, a plaintiff must show that the defendant, under color of state law, deprived the plaintiff of a right secured by the Constitution and laws of the United States. *See* 42 U.S.C. §1983. Section 1983 alone creates no substantive rights. *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979). Instead, it only provides a remedy for deprivations of rights established in the Constitution or federal laws. *Id.* An underlying constitutional or federal right must exist before a claim under section 1983 exists. *Id.* at 140.

Initially, the Court notes that it is beyond doubt that the Due Process Clause of the Fourteenth Amendment does not create a duty by a government to make its citizens safe. *See Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). "The Clause is phrased as limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Weenebago County Department of Social Services*, 489 U.S. 189, 196 (1989).

However, "courts use the special relationship analysis to find liability under §1983 in cases where a plaintiff seeks to hold the state responsible for the private actions of a third party." *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 352 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990). A government may have a duty to protect an individual if: (1) a special relationship exists between the victim plaintiff and a third party or the victim and a government defendant; and (2) there is some degree of culpable conduct by the defendant. *Cornelius*, 880 F.2d at 352-353.

Furthermore, "a plaintiff may also show a duty on the state's part under §1983 by establishing that the plaintiff, as opposed to the general public, faced a special danger." *Id.* at 354. This special danger approach is similar to the special relationship analysis in

that for a duty to protect to arise it requires a special relationship and culpable conduct by a defendant. *Id.* at 354-355. It is somewhat distinct, however, in that it encompasses situations where the government not only has a special relationship with the victim and fails to protect the individual, but also creates a danger or places an individual in danger. *See Id.* at 354; *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

Generally, these cases involve individuals harmed by an inmate or some other individual under government control. *See Cornelius*, 880 F.2d 348 (city government held liable for the damages suffered by a city hall employee kidnapped and terrorized by a prisoner in a community work program at city hall who was improperly supervised and had access to weapons); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987) (city government held liable for the beating death of a motorist by an inmate allowed to use a squad car to run errands for the local sheriff, where inmate pulled over victim using blue lights of the squad car). *But see Martinez v. California*, 444 U.S. 277 (1980) (parole board not held liable for murder of girl by a parolee five months after his release); *Jones v. Phyfer*, 761 F.2d 642 (11th Cir. 1985) (state prison official not held liable for murder of woman by inmate on furlough who had been convicted of breaking into woman's house six months earlier, where state did not warn woman of inmate's furlough) *Wright v. City of Ozark*, 715 F.2d 1513 (11th Cir. 1983) (city not held liable for murder by unknown assailant outside of city's custody).

The Eleventh Circuit's decision in *Cornelius* is instructive as to the interplay of factors necessary to create a duty by a government to protect a private party. In *Cornelius*, the plaintiff was a city employee who worked in city hall. Two inmates, who worked in city hall under a community work program, kidnapped plaintiff. The Eleventh Circuit found the inmates were

inadequately supervised, evidenced in part by the fact that these were dangerous inmates, who, while working at city hall, were free to roam the halls and had access to knives and machetes. *Cornelius*, 880 F.2d at 358. Plaintiff sued various parties, including the city and the prison warden, under section 1983.

The district court granted summary judgment in favor of the defendants, holding as a matter of law that defendant owed no duty to protect plaintiff. The Eleventh Circuit reversed. It held that questions of fact existed as to whether defendants owed plaintiff a duty to protect her. It held that under the special relationship and special danger approach, evidence existed that defendants owed the plaintiff a duty to protect her from the harm they created. First, it found that the defendants had a special relationship with both the third party inmates and the plaintiff because of the inmates custodial status and plaintiff's employment with the city. Id. at 355-356. Second, it stated that the defendants created the danger by administering the community work program and *knowingly* allowing dangerous criminals to work unsupervised and have access to weapons. *Id.* at 357-358. It explained that defendants were "aware of the danger present from the community work squad inmates yet did nothing to alleviate or protect against the danger." *Id.* at 358. Third, it determined that defendants increased plaintiff's exposure to the danger because her job as city employee required her to work in city hall in close proximity to the inmates. *Id.* at 359.

That this case does not involve the wrongful action of a third party somewhat distinguishes it from the special relationship and special danger cases relied upon by Plaintiffs. The Court finds, however, that the closeness of the relationship of Greg Neely and Dade County and the actions of Dade County are still relevant to whether Dade County owed a duty to protect Greg Neely from danger. The substitution of the direct action

of the government as the cause of the harm as opposed to the action of a third party only strengthens the rationale for finding a duty to protect.

Thus, the Court must decide whether under the special relationship or special danger approach, Dade County had a duty to protect Greg Neely from the danger it created. To do that the Court must analyze: (1) the closeness of the relationship between Dade County and Greg Neely; and (2) the affirmative misconduct of Dade County. *See Cornelius*, 880 F.2d 356-357; *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

The Court holds that under the Due Process Clause of the Fourteenth Amendment Defendants did not have a duty to protect Greg Neely. First, the Court finds that Defendants are not guilty of any *affirmative misconduct* sufficient to create a constitutional duty. While the incident is truly and horribly tragic, it was not caused by the sort of affirmative misconduct by a government which should give rise to a duty to protect private individuals. The situation here is a far cry from that of *Cornelius*. *Cornelius* involved the knowing placement of unsupervised dangerous criminals with access to machetes in close proximity to other city workers. This case, however, at most, involves: (1) Defendants requesting that Life Force and Greg Neely come to the scene of the accident to aid in the rescue effort; and (2) Defendants failure to appoint an Emergency Management Director, which allegedly caused inadequate training of rescue workers in regard to the proper use of ropes and the proper supervision of a rescue site.

Instead, this case is much closer to the situation in *Monahan v Dorchester Counseling Center, Inc.*, 961 F.2d 987 (1st Cir. 1992). There a voluntary mental

patient was injured when he jumped out of state van. He sued the state under section 1983, alleging that the state knew that he had a propensity to jump out of moving vehicles, yet made no special provisions in transporting him by van. He contended the state's action increased his exposure to danger, thus creating a duty to protect him. The First Circuit rejected the plaintiff's claim, in part, because the state's conduct "was not the kind of 'affirmative act' on the part of the state which would give rise to a *constitutional* rather than a tort duty to protect [the plaintiff]." *Id.* at 993.

Second, the Court finds that Dade County and Greg Neely did not have a sufficiently close relationship to create a duty on the part of Dade County to protect Greg Neely. Admittedly, once Life Force, including Greg Neely, had been called to scene, and Greg Neely agreed to rappel of the cliff, he was dependent upon Dade County for rappeling equipment and direction. Unlike *Cornelius*, however, there was no employer-employee relationship between Dade County and Greg Neely that compelled him to work in a certain place or perform a particular task at the direction of Dade County.[1] While there was no doubt great pressure on

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[1]The Court notes that in *Monahan* the First Circuit criticized the Eleventh Circuit's statement in *Cornelius* that there was a special relationship between the city and the plaintiff because the city had "a degree of control" over plaintiff as a city employee. The First Circuit stated that the Eleventh Circuit's reasoning may be called into doubt by the recent Supreme Court case specifically rejecting a claim that "the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *See Collins v. City of Harker Heights, Texas*, ____ U.S. ____, 117 L.Ed.2d 261, 274 (1992).

Greg Neely to rappel off the cliff, he was not compelled to do so by an employer. As the First Circuit remarked in *Monahan*, "the [government] did not force [the plaintiff] against his will, to become dependent upon it. *Monahan*, 961 F.2d at 993.

Thus, the Court finds that Plaintiffs have not stated a claim under section 1983 because they have not established that a special relationship existed between Dade County and Greg Neely, or that Greg Neely faced a special danger created by Dade County, sufficient to create a duty on the part of Dade County to protect Greg Neely. Defendants conduct in failing to appoint an Emergency Management Director and in calling Life Force to the scene, coupled with the lack of even an employer-employee relationship compelling Greg Neely to do what he did, does not create a duty under either approach. The level of affirmative misconduct and closeness of relationship between the parties present in *Cornelius* is simply not present here.

IV. Conclusion

Accordingly, the Court GRANTS Defendants' Motion for Summary Judgment, and DISMISSES Plaintiffs' case.

IT IS SO ORDERED, this the 28th day of October, 1993.

/s/ Harold S. Murphy
United States District Judge

Rome, Georgia

This Court agrees that *Collins* may call into doubt the Eleventh Circuit's statement. Regardless, however, the situation in this case is distinguishable. As stated above, unlike *Cornelius*, the plaintiff in this case was not an employee of the defendant.

APPENDIX III. FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President for the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion

against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX IV. 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

No. 94-2072

Supreme Court, U.S.
FILED
JUL 14 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

L. DEWAYNE NEELY and GLENDA CAROL CHADWICK, Individually and as Administrators of the ESTATE OF GREGORY DEWAYNE NEELY,

Petitioners,

vs.

DADE COUNTY, GEORGIA, a Political Subdivision of the State of Georgia, and its BOARD OF COMMISSIONERS, in their Official Capacity,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Dade County, Georgia had a special relationship with Gregory Dewayne Neely or created a special danger faced by him sufficient to give rise to a fourteenth amendment duty on the facts of this case.

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OPINIONS AND JUDGMENT BELOW

Within the Appendix to the Petition for Writ of Certiorari Petitioners have provided the Order of the Honorable Harold L. Murphy, Judge, United States District Court for the Northern District of Georgia (hereinafter referred to as the "district court"), entered on October 29, 1993. Petitioners also include in their Appendix the March 14, 1995 decision of the United States Court of Appeals for the Eleventh Circuit (hereinafter referred to as the "Eleventh Circuit") in *Neely v. Dade County, Georgia, et al.*, No. 93-9439, (per curiam) (11th Cir., March 14, 1995). However, Petitioners have not included in their Appendix the Eleventh Circuit's per curiam denial of Petitioners' Suggestion for Rehearing *en banc*, dated May 22, 1995. Respondents have provided that decision as Appendix A hereto.

STATEMENT OF JURISDICTION

Respondents agree with Petitioners' Statement of Jurisdiction. Respondents additionally show that jurisdiction is conferred by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents agree that this action involves the fourteenth amendment to the Constitution of the United States and 42 U.S.C. § 1983 but deny owing any liability to Petitioners thereunder.

STATEMENT OF THE CASE

Petitioners in these proceedings were the plaintiffs in the district court, L. Dewayne Neely and Glenda Carol Chadwick. Petitioners are the parents of Gregory Dewayne Neely (hereinafter alternately referred to as "the deceased" or "Neely") and the Administrator and Administratrix, respectively, of Neely's estate. R2-18-2. Dade County, Georgia and its Board of Commissioners, in their official capacity, are Respondents herein.

On September 29, 1992, Petitioners filed this suit alleging negligence, wrongful death, and civil rights violations pursuant to 42 U.S.C. § 1983, the fifth amendment and the fourteenth amendment. R1-1-5. Specifically, Petitioners contended that Respondents:

> [M]aintained an intentional and impermissible policy of allowing emergencies such as that involved in this situation to be undertaken in an unorganized, improper and dangerous manner . . . [such acts constituting] gross negligence and were intentional and pursuant to an impermissible policy allowing unsafe distribution of equipment or materials (the rope) for emergency management purposes and deprived Greg Neely of his life.

R1-1-4. Petitioners also asserted pendent state law claims for negligence and wrongful death. R1-1-4.

On August 2, 1993, Respondents filed their Motion for Summary Judgment. R2-19. By Order entered October 29, 1993, the district court granted Respondents' motion, and judgment was entered that same day. R5-27; R5-28.

Petitioners filed their Notice of Appeal with the district court on or about November 29, 1993. R5-29-1. The Eleventh Circuit affirmed without opinion, *Neely v. Dade County, Georgia, et al.*, No. 94-9439 (11th Cir., March 14, 1995) (per curiam) and then denied Petitioners' suggestion of rehearing en banc, *Neely v. Dade County, Georgia, et al.*, No. 94-9439 (11th Cir., May 22, 1995).

The pertinent facts are as follows: Prior to the incident at issue in this litigation, Dade County, Georgia created a local organization for emergency management, the position of Emergency Management Director, and an emergency operations plan, all pursuant to the Georgia Emergency Management Act (hereinafter referred to as "GEMA"). Exhibit Folder – Deposition of Larry Moore, pp. 9-14 (hereinafter referred to as "Moore Deposition"); R3-23, Trenton – Dade County Emergency Operations Plan (hereinafter referred to as "the Plan"). The Plan identifies various hazards and assigns responsibility to organizations in the county for those hazards and assigns the Emergency Management Director primary responsibility for coordination of search, rescue and recovery. R3-23, Trenton – Dade County Emergency Operations Plan, Annex 3. In the event the Emergency Management Director is unavailable, the county sheriff has responsibility for coordinating search, rescue and recovery. R3-23, Trenton – Dade County Emergency Operations Plan, Attachment F.

It is undisputed that the original Emergency Management Director resigned on February 7, 1989, and that Dade County was without an Emergency Management

Director for the twenty (20) months immediately preceding Neely's death. Pursuant to the Plan and in compliance with GEMA's requirements, however, the county sheriff served as the interim successor during this time. R3-23, Trenton – Dade County Emergency Operations Plan, Attachment F. *See* O.C.G.A. § 38-3-50, which provides that the interim successor exercises the duties of the appointed officer (i.e., director) until a new director is appointed. During the time there was no Emergency Management Director, all rescue training and procedures continued unchanged. Exhibit Folder – Moore Deposition, pp. 12-13, and 50.

Neely worked for the Erlanger Medical Center in Chattanooga, Tennessee as a member of the Life Force helicopter ambulance unit. R1-1-2. In the late afternoon of October 2, 1990, Paul Arnold, an emergency medical technician employed by Hutcheson Medical Center, contacted the dispatcher for the Dade County Sheriff's Department. R4-25-1 and 3. Arnold asked the dispatcher to contact Life Force and request that it fly to Sand Mountain in Dade County to assist with the rescue of an individual who had fallen from the mountain. *Id.* at 2 and 3. Arnold called the Dade County Sheriff's Department because, at the time, all radio transmissions from Hutcheson EMS regarding Dade County emergencies were dispatched by the Sheriff's Department. *Id.* at 2; Exhibit Folder – Deposition of Phillip Street, pp. 46-47.

The Life Force helicopter ambulance, with Neely aboard, responded to the call. Exhibit Folder – Deposition of Kathleen Marie Coronet, p. 6 (hereinafter referred to as "Coronet Deposition"); Deposition of Daniel Edward

Norman, p. 6 (hereinafter referred to as "Norman Deposition"). When it arrived, Arnold requested that the Life Force paramedic (Neely) descend the bluff to render assistance to the man who had fallen. Exhibit Folder – Coronet Deposition, p. 7; R4-25-2. Neely agreed to do so and asked for some rappelling gear to use. R2-19, Affidavit of Delbert Wallin, p. 2 (hereinafter referred to as "Wallin Affidavit").

Prior to his descent, Neely was asked by a member of a local rescue unit if he (Neely) was experienced in rappelling. R2-19, Wallin Affidavit, p. 2. Neely said that he was, and he then hooked up the rappelling gear and descended down the bluff without incident. R2-19, Wallin Affidavit, p. 2.

Later, Neely used the rappelling gear to ascend the bluff, again without incident, and he stopped at a ledge approximately six (6) feet wide located just below the top of the bluff. R2-19, Arnold Affidavit, p. 2; Wallin Affidavit, p. 2. Delbert Wallin, a volunteer member of the Trenton Fire Department who was assisting in the rescue, was on the ledge at the same time as Neely. R2-19, Wallin Affidavit, p. 2. Neely asked for and received Wallin's assistance in removing the rappelling gear. *Id.*

Wallin then showed Neely a trail and told Neely he could safely walk to the top of the bluff on the trail. R2-19, Wallin Affidavit, p. 2. Indeed, Wallin had walked the trail several times earlier that day. *Id.* Wallin also showed Neely a white rope and told Neely to hold on to the rope as he walked up the trail. R2-19, Wallin Affidavit, pp. 2-3; R3-23, Sworn Statement of Delbert Wallin, p. 30. Petitioners' statement, at page 3 of their Petition for

Writ of Certiorari, that Neely "was then thrown a white rope by County personnel" is contrary to the evidence of record, as Wallin was a volunteer member of the City of Trenton (Georgia) Fire Department.

Wallin then returned to his business and diverted his attention away from Neely. R2-19, Wallin Affidavit, p. 3. At that time and contrary to Wallin's suggestion, Neely attempted to climb the bluff using the rope Wallin had shown him. *Id.* As Neely neared the top of the bluff, the rope broke. Neely fell some considerable distance, sustaining injuries which eventually caused his death.

SUMMARY OF ARGUMENT

While Petitioners do not reference Rule 10 of this Court's Rules in their Petition or even argue that this case merits review for any of the reasons set forth in Rule 10, it appears that review is sought pursuant to subsection .1.(c). That is, Petitioners apparently contend that the Eleventh Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court." Specifically, Petitioners ask this Court to grant review of this case in order to determine whether governmental entities have a duty to non-employee rescue workers sufficient to trigger fourteenth amendment due process protections ("minimal levels of safety and security"). Petition for Writ of Certiorari, p. 5.

Certiorari should not be granted to Petitioners because the question they present is simply not appropriate for appellate review here. The question before the district court was not whether, in a general sense, a county owes a duty to

non-employees, as Petitioners have posited here. The question, as framed by Petitioners below, was whether Dade County owed Neely a duty "due to the [alleged] special relationship and [alleged] special danger present under the circumstances." R3-23, Plaintiffs' Brief in Support of Response to Motion for Summary Judgment, p. 11. In the context of the constitutional duty issue, it was this question, and this question alone, that the district court considered. Thus, the question Petitioners seek this Court to answer was never addressed by either of the courts below.

Moreover, Petitioners apparently misconstrue this Court's holding in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992). This Court did not hold in *Collins* that a fourteenth amendment duty could never arise in the context of an employment relationship; indeed, the Court pointed out instances in which such a duty *could* be found. *Collins*, 503 U.S. at 119. At the same time, the Court did not hold that a duty to provide minimal levels of safety and security would *always* be present in the non-employment context. Rather, the Court specifically noted that "[t]he employment relationship . . . is not of controlling significance." *Collins*, 503 U.S. at 119.

In short, Respondents submit there must be a factual analysis of each case to determine whether the relationship between the parties or the nature of the conduct of the government gives rise to a legal duty. This is precisely what the district court did here. It granted summary

judgment, not because it held that a governmental entity (Dade County) owes no duty to non-employees, but because it found no special relationship existed between Neely and Dade County and because it further found that Neely did not face a special danger created by Dade County. R5-27-16.

The undisputed facts show that both the district court and the Eleventh Circuit properly decided Petitioners' fourteenth amendment claim. Neely, who worked for Erlanger Medical Center in Chattanooga, Tennessee, came to the rescue scene at the request of Hutcheson EMS (albeit transmitted through the Dade County Sheriff's Department) and at the direction of his employer, not Respondents. Neely was not requested by Dade County to rappel down the bluff; Paul Arnold of Hutcheson EMS asked him to. R4-25-2. Dade County did not direct Neely to remove his rappelling gear, *he* chose to take it off. R2-19, Wallin Affidavit, p. 2. Neely was shown a path by which he could have safely walked to the top of the bluff, but *he* chose not to take it. *Id.*

The rope Neely used to climb to the top was shown him by a City of Trenton volunteer firefighter, Wallin, who told him he (Neely) could hold on to it as he walked the trail. R2-19, Wallin Affidavit, pp. 2-3; R3-23, Sworn Statement of Delbert Wallin, p. 30. Neely, using his own judgment, chose to disregard Wallin's suggestions, and instead tied the rope around his body and yelled to the workers above to pull him up. R5-27-2; R3-23, Sworn Statement of Woodrow C. Jones, p. 59. No one compelled, or even asked, Neely to use the rope in the manner in which he used it.

The courts below correctly concluded that no constitutional duty was owed by Respondents to Neely. There was no evidence of any special relationship between them, and Respondents did not restrict Neely's freedom or impair his ability to act on his own. Nor was there any evidence that any custom or policy of Dade County caused the alleged violation of Neely's rights. Finally, to the extent Petitioners argue that Respondents' negligence was the cause of Neely's death, such alleged negligence is legally insufficient to form the basis for fourteenth amendment liability.

ARGUMENT

Rule 10 of the Rules of this Court sets forth the basis upon which a Writ of Certiorari may be granted. The Rule reads in pertinent part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as

> to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.

Respondents have assumed, based upon the content of the Petition for Writ of Certiorari, that subsection .1.(c) of Rule 10 is relied upon by Petitioners in support of the instant Petition. Apparently, Petitioners contend that the Eleventh Circuit, by affirming the district court's decision without opinion, has "decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1.(c). That question seemingly is whether, as a general principle of constitutional law, governmental entities owe a duty, under the Due Process Clause of the fourteenth amendment, to provide safety and security to non-employees performing governmental operations.

However, that question, which Petitioners have asked this Court to answer, was not briefed or argued below. R2-19; R3-23; R4-24. As stated above, what Petitioners asked the district court to find, in response to Respondents' motion for summary judgment, was that:

> Dade County owed Greg Neely a duty to provide an adequately trained and skilled emergency management organization, including a

> local director of emergency management so that adequately trained and supervised rescue workers would not place him in danger, but would provide some degree of protection due to the special relationship and special danger present *under the circumstances.*

R3-23, Plaintiffs' Brief in Support of Response to Motion for Summary Judgment, p. 11 (emphasis supplied). *That* is the question the district court decided in granting Respondents' motion for summary judgment. It rejected Petitioners' contention that there was either a special relationship or a special danger present under the circumstances. R5-27-14 and 15. Therefore, under the facts of this case, the district court found no duty to exist.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), this Court discussed the dimensions of its discretionary review and why cases, such as this one, are not among those for which such review will be granted.

> [W]e have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19, 28 U.S.C.A.
>
> * * *
>
> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions,

> for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 616 (citations omitted).

Applying the rationale of the *Rice* decision to this case, there can be no doubt that this case is not one presenting "special and important reasons" as required by Rule 10 (formerly Rule 19). Instead, the Court has been asked to decide a question of constitutional law not even argued by the parties below.

Moreover, Respondents submit that this Court's decision in *Collins* is dispositive of the outcome of this case. Petitioners have attempted to invoke this Court's review by suggesting that because Neely was not an employee of Dade County, this case is distinguishable from *Collins*. Yet, the Court in *Collins* specifically noted, "The employment relationship . . . is not of controlling significance." *Collins*, 503 U.S. at 119.

Continuing with this "logic," Petitioners then suggest that because Neely was not an employee, this case is more akin to the *Revere, Youngberg, Bell* and *Estelle* "custody" cases. Petition for Writ of Certiorari, p. 12. An examination of each of these cases, however, reveals a factor not present either in *Collins* or here – in each, there had been some deprivation by the state of the liberty of the claimant. Indeed, *Collins* explicitly distinguished the case before it from the line of cases urged by Petitioners here based on the fact that Collins was not deprived of his liberty.

> [Petitioner's claim] is quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those *who have*

> *already been deprived of their liberty*. We have held, for example, that apart from the protection against cruel and unusual punishment provided by the Eighth Amendment, . . . the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, *see Bell v. Wolfish*, . . . for persons in mental institutions, *Youngberg v. Romeo*, . . . and for persons under arrest, *see Revere v. Massachusetts General Hospital*, . . . The process that the Constitution guarantees in connection with any deprivation of liberty thus includes a continuing obligation to satisfy certain minimal custodial standards. *See DeShaney*,. . . .

Collins, 503 U.S. at 127-28 (citations omitted; emphasis supplied).

Those cases relied upon by Petitioners herein are distinguishable for the same reason. Petitioners cannot, in good faith, maintain that Dade County deprived Neely of his liberty when he voluntarily accepted employment with Erlanger Medical Center and voluntarily undertook the various acts that ultimately led to his death.

Petitioners' argument is flawed, because it begins with the premise that the state owes a fourteenth amendment duty to protect the lives of the public as a whole. This Court has made clear, however, that such a duty does not exist:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a

> guarantee of certain minimal levels of safety and security.

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195 (1989). Instead, a duty such as that urged by Petitioners will be found only where a special relationship or special danger is present. *Collins*, 503 U.S. at 127-28; *DeShaney*, 489 U.S. at 198-99. The courts below soundly concluded that neither was present here.

In the final analysis, all Petitioners are hoping to obtain is a third chance to convince a court that the facts of their case are such that they should get to a jury. Respondents submit such a goal is not among the "special and important reasons" for which review on certiorari was designed. Accordingly, the Petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter, because the justiciable concerns required by Rule 10 of the Rules of this Court are not present. There is no need for this Court to decide the broad question presented by Petitioners, because such a decision is not needed to resolve the case now before this Court. An examination of the facts of this case and the applicable law is all that is needed. Petitioners' attempt to transform this case into something that it is not should be rejected.

The lower courts properly applied Fed. R. Civ. P. 56 in ruling Respondents were entitled to judgment as a matter of law. No genuine issues of material fact existed for trial, and Respondents showed that under the applicable law they were entitled to summary judgment.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.
DENIAL OF SUGGESTION OF REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9439

L. DEWAYNE NEELY, et al.,

Plaintiffs-Appellants,

versus

DADE COUNTY, GEORGIA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

[Filed May 22, 1995]

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: JFD/PHR/ESCHBACH

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE